

Resolution No.: 15-1117
Introduced: July 26, 2005
Adopted: July 26, 2005

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
IN MONTGOMERY COUNTY**

By: County Council

**SUBJECT: APPLICATION NO. G-809 FOR AMENDMENT TO THE ZONING ORDINANCE
MAP, Jody Kline, Esquire, Attorney for Applicant, Maria Ruth Burley, OPINION AND
RESOLUTION ON APPLICATION**

Tax Account Nos. 10-00849463 and 10-00849452.

OPINION

Application No. G-809, filed on May 9, 2003, by Applicant Maria Ruth Burley, requests reclassification from the existing R-90 Zone (Residential- single family homes) to the R-T 8 Zone (Residential Townhouse, with maximum of 8 units per acre) of 5.23621 acres of land.¹ The subject site is comprised of Parcels 361 and 417, and it is located at 10401 and 10525 Seven Locks Road in Potomac. It is on the east side of Seven Locks Road, approximately 1,600 feet north of its intersection with Democracy Boulevard. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits the filing of a Schematic Development Plan (SDP), containing binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development with "[n]ot more than 31 (thirty-one) one-family attached dwelling units."² The Planning Board and its Technical Staff supported the proposed rezoning, stating that corrections to protect the environment would be made at subdivision and site plan review.

¹ The case was delayed because it was removed from the calendar for a lengthy period, at Applicant's request, to allow her more time to work with Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC").

² Applicant's original plan called for 34 units, but based on Technical Staff's concerns, that number was reduced, first to 30 units, then to 27 units. The number ultimately went back up to a maximum of 31 units, after the Council approved Bill No. 24-04/25-04/27-03, effective April 1, 2005, which, *inter alia*, amended Montgomery County Code §25A-5(a) to expand the

The Hearing Examiner recommended remand of the application for further proceedings because, as currently planned (*i.e.*, a 31 unit SDP), environmental and traffic concerns render the proposed development inappropriate for the R-T 8 Zone at the proposed location, incompatible with its surroundings and contrary to the public interest. The Hearing Examiner did not recommend outright denial because the subject site would be appropriate for the R-T zone, and the proposed development would be in the public interest and compatible with existing and planned land uses in the surrounding area, if the density and physical arrangement of the site were revised to eliminate the environmental and traffic problems which will impact adversely on the neighbors under the current, 31 unit SDP. To avoid unnecessary detail in this Resolution, the Hearing Examiner's Report and Recommendation dated July 12, 2005 is incorporated herein by reference.

A public hearing was convened on April 8, 2005, at which time the Applicant presented the testimony of an expert in land use planning in support of the application. Opposition testimony was presented by three nearby residents, Steve Dye, Lynn Mayo and Francis Cameron. Ms. Mayo testified as an expert in water resources management. Martin Klauber, the People's Counsel, participated in the hearing, and called himself as a witness to rush hour traffic conditions on Seven Locks Road. He maintained a neutral position on the application. Testimony regarding storm water management was also provided by Richard R. Brush, Manager of the Water Resources Plan Review Section of the Department of Permitting Services (DPS), which had approved a Stormwater Management Concept Plan (SWMCP) for the subject site when its SDP called for 27 dwelling units. Mr. Brush appeared at the request of both the Applicant and the Opposition.

The record was held open until May 9, 2005 to allow Applicant time to file a revised SWMCP for an SDP with 31 dwelling units. DPS approved the new SWMCP on April 26, 2005, and in so doing granted a total waiver of all quantity control requirements. At the request of Applicant, the record was

applicability of the MPDU requirements to all residential developments of 20 or more units submitted for approval of a

further held open until June 1, 2005, to allow Applicant more time to file the executed Declaration of Covenants. They were eventually filed on June 1, 2005, and the record closed on that date.

The subject site is almost rectangular in shape, with approximately 458 feet of frontage on Seven Locks Road and a maximum depth of approximately 569 feet. It is approximately 77 percent forested, with significant, large specimen trees and very steep slopes. Presently, the site is developed with a single detached dwelling unit in the southwest corner of the site. There is a winding driveway from Seven Locks Road to the dwelling unit. The property rises from a low point in the southwest corner with an overall grade of 16.5 percent. The steepest slopes are to the west, reaching a 21.2 percent grade and from the southwest corner, reaching a 24 percent grade.

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The District Council finds that the "surrounding area" in this case was best described by Applicant's Land Use Expert, Alfred Blumberg, whose definition was accepted by the Hearing Examiner. It is that area bounded by Bells Mill Road to the north, Cabin John Regional Park to the east and Democracy Boulevard to the south, and including the confronting properties across Seven Locks Road to the west of the subject site.

The property immediately north of, and abutting the site, is zoned R-T 12.5 and is developed with the Inverness North townhouse complex. The Scotland Community abuts the Inverness North townhouses to the north, is zoned R-T 12.5, and consists of 100 townhouses, of which 25 are owner-occupied and 75 are rental units. To the east and along the subject site's rear property line is the Cabin John Regional Park, zoned R-90, and owned by the Maryland-National Capital Park and Planning Commission (M-NCPPC). Two contiguous forested parcels, P400 and P455, abutting the subject site and within the Park were acquired by the M-NCPPC from the Burley estate in 1964 by mutual agreement. To the south of the subject site, the property is zoned R-T6.0 and developed with the Turning Creek townhouse complex. The remaining

properties south of and along Seven Locks Road are zoned R-90 and are either undeveloped or developed with single-family detached dwelling units. Directly across Seven Locks Road and west of the site, the property is zoned R-90 and developed with a private educational institution, the Heights School. A special exception was granted to operate this educational institution in 1967. South and west of the Heights School, the properties are zoned R-90 and developed with single-family detached dwelling units. North of the Heights School, the property is zoned R-90 and developed with the Inverness Forest subdivision, consisting of single family and townhouse units.

The zoning history of the subject site is a bit complex. In the 1954 countywide comprehensive zoning, the R-A Zone was enacted, but that was changed to the R-90 Zone in the 1958 Countywide comprehensive zoning. In Sectional Map Amendment G-247, approved September 30, 1980, the R-90 Zone reconfirmed, as it was again in Sectional Map Amendment SMA-800, approved October 10, 2002. However, on December 30, 1969, the subject site was reclassified to the R-T Zone by Local Map Amendment F-419. At that time, the R-T Zone permitted densities up to 12.5 dwelling units per acre. At the request of the Burley family, the property was reclassified back to the R-90 Zone on July 9, 1973, to avoid the increased tax burden of the R-T Zone.

The Applicant seeks to have the subject site reclassified from its current R-90 Zone to the R-T 8 Zone so that she can construct a maximum of thirty-one residential townhouse units on the 5.23621 acre subject site. The plan is for all the units to surround a landscaped courtyard. Twenty-seven of the 31 townhouse units would have two-car garages, and four of the units would have single car garages. It is intended that the four units with single garages be Moderately Priced Dwelling Units (MPDUs). An additional 18 parking spaces are located outdoors, surrounding the center of the development, bringing the total to 76 parking spaces.

Access to the site would be from Seven Locks Road via a winding private roadway. No phasing schedule for construction of the development is proposed, and there are no historic resources on the

property. If rezoning is ultimately approved, the proposal will have to go through review and approval of a Preliminary Plan of Subdivision, a Site Plan, a Final Forest Conservation Plan and a Final Plat of Subdivision by the Planning Board.

The Applicant in the present case has proposed binding elements which limit development to a maximum of 31 one-family attached units, with a maximum building coverage of 20%, and a minimum green area of 65%. The Site Data and Development standards call for a density of 5.92 dwelling units per acre, a 160 foot setback from the public street and 76 parking spaces (54 in two-car garage units, 4 in one-car garage units and 18 in bays located in the central courtyard). The Development Standards for the R-T 8 Zone are spelled out in Zoning Ordinance §59-1.73, and the District Council finds that the proposed development would meet or exceed those standards.

The opposition in this case raised many issues in letters to the Planning Board; however, the two most significant issues were also the subject of extensive testimony at the public hearing. Those issues are environmental impact, mostly from stormwater runoff, and traffic volume and safety concerns. The Council finds that the other issues raised by the opposition – crowded schools, impacts of blasting during construction and unsafe driveway slopes, have been eliminated by the evidence at the hearing. The schools in the Churchill Cluster are crowded, but based on data from Montgomery County Public Schools, they have adequate capacity to support additional development under the standards established in the Annual Growth Policy (AGP). Evidence at the hearing also established that blasting will not be needed for construction and that the intended slope of the access driveway will be within appropriate limits. The environmental and traffic concerns are a different matter.

The thorniest factual and policy issue in this case involves the potential impact on the environment from inadequately controlled stormwater runoff. Testimony from Applicant's neighbor, Lynn Mayo, who is an expert in water resources management, established that the proposed development, as presently configured with 31 townhouse units, will produce significant stormwater runoff on neighboring property,

causing erosion and possibly ill effects on the nearby Cabin John Creek.³ Testimony from Richard Brush, Manager of the Water Resources Plan Review Section of DPS, established that DPS will not disapprove a SWMCP for an SDP approved by the Council, even if the density and/or configuration of the development make it impossible to fully comply with stormwater management regulations. Rather, DPS will try to get the best stormwater management facilities that are practical for the proposed SDP, and will waive any requirements that cannot be met under the approved SDP. This approach is taken by DPS not only at this stage of the review, but also at subdivision and site plan review.

In the subject case, DPS found, after the hearing, that stormwater quantity controls (*i.e.*, channel protection measures) are not practical on the 31 unit SDP and it therefore granted a waiver of all requirements for such controls.⁴ The District Council thus cannot assume that the environmental problems highlighted at the hearing will be resolved by subsequent Planning Board and DPS review absent a revised SDP. Accordingly, the Council concludes that a remand is necessary to give Applicant the opportunity to file a revised SDP containing a sufficient reduction in the number of planned dwelling units such that the Department of Permitting Services can approve a Stormwater Management Concept Plan without waiving channel protection requirements.

The traffic issue was raised by the testimony of People's Counsel, Martin Klauber, and by the testimony of Applicant's neighbor, Steve Dye. Mr. Klauber testified that he passes the subject site every day on his way to work and that the proposed location of the access driveway to the subject site, directly opposite the entrance to the Heights School, would create a traffic hazard, since cars queue up in the area waiting to turn into the school's driveway. Mr. Dye testified as to extensive traffic backups on Seven locks Road in this area, and he introduced photographs of these backups to support his testimony. Applicant did not call an expert in traffic engineering and transportation planning, but rather relied on the Technical Staff

³ Ms. Mayo's testimony was buttressed by the testimony of another neighbor, Francis Cameron.

⁴ Prior to the hearing, the SWMCP had been submitted for a 27 unit SDP, and DPS found it necessary to grant only a partial waiver of quantity controls.

report. That report (Exhibit 46, page 12) indicates that the proposed 31 townhouse units would generate 14 trips in the peak hour of the weekday morning peak period (6:30 a.m. to 9:30 a.m.) and 25 trips in the peak hour of the weekday evening peak period (4:00 p.m. to 7:00 p.m.).

Under the applicable standards for Local Area Transportation Review (LATR), a traffic study is not needed for a development that does not generate 30 peak-hour trips in either the morning or the evening. However, it is clear from the ruling of the Maryland Court of Appeals in *Tauber v. Montgomery County Council*, 244 Md. 332, 223 A.2d 615 (1966), that the Council may reject a rezoning application based on testimony of traffic problems, even though the proposed development passed an LATR type of review. In *Tauber*, the court, in upholding the Council's rejection of the rezoning request, stated:

The Technical Staff of the Maryland-National Capital Park and Planning Commission recommended approval of the application but the Montgomery County Planning Board declined to accept this recommendation and recommended denial because in its opinion the request for rezoning was premature and would create "a potentially hazardous and undesirable traffic situation." At the hearing on July 30, 1964, before the District Council, the applicants presented expert testimony indicating that the proposed development would not generate sufficient traffic to have a significant effect upon the operational safety of the adjacent streets. This opinion, however, was based upon a traffic count for one hour in the morning and one hour in the afternoon of February 7, 1964, at the intersection of Massachusetts Avenue and Westbard Avenue [*i.e.*, an LATR type of analysis]. Certain witnesses for those protesting against the granting of the application, testified that there were severe traffic conditions at the intersection. One witness testified that at times the traffic was backed up from the intersection in both directions for over one-half a mile and that there had been a number of accidents at what he described as a traffic bottleneck. There was other testimony on behalf of the protestants indicating a dangerous traffic condition at the intersection which would be aggravated by the erection of the proposed apartment house.

The rationale of the *Tauber* decision was also applied by the Court of Appeals in the context of an application for rezoning to the R-T Zone, in *Montgomery County v. Laughlin*, 255 Md. 724, 259 A.2d 293 (1969).

Even though the Applicant in the instant case has met the LATR standards without a traffic study, the District Council finds, based on the unrefuted evidence at the hearing, that there is a traffic congestion problem on Seven Locks Road, and that the proposed development will make it worse, and possibly

dangerous. Applicant has acknowledged, in General Notes (not binding elements) on the SDP (Exhibit 89(a)), that “conditions of approval at the subdivision and site plan review may include measures intended to improve transportation capacity and traffic flow, including an additional turning lane from Seven Locks Road into the site.”

The District Council finds that this acknowledgement is not a sufficient commitment by Applicant to make any changes or improvements that the Planning Board feels would alleviate traffic congestion and safety problems in the area. Absent a binding commitment by Applicant, the Planning Board might be reluctant to push the Applicant to take steps to relieve traffic congestion (as distinguished from improving traffic safety), in view of the fact that the proposed development already meets LATR standards. Moreover, it is by no means clear on the record that all of the traffic problems can be alleviated, given the location of the Heights School entrance directly opposite the subject site. There is no evidence in this record that moving the proposed access for the subject site would remedy the problems Mr. Klauber testified about without creating other, perhaps more serious, traffic problems. Therefore, the Council concludes that this case should be remanded to allow Applicant the opportunity to present expert evidence on safety and congestion issues and to make a commitment, in binding elements, to take remedial actions found necessary by the Planning Board.

A floating zone, such as the R-T 8 Zone, is flexible device, and individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), and that it will be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*.

Under the “purpose clause” set forth in Zoning Code §59-C-1.721, the R-T Zone may be applied if a proposal meets any one of three alternative criteria: (1) it is in an areas designated for R-T Zone densities (implying a master plan designation); (2) it is in area that is appropriate for residential development at densities that are allowed in the R-T Zones; or (3) it is in an area where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.

The subject property is located in the area covered by the Potomac Subregion Master Plan, approved and adopted in April 2002. The Master Plan does not designate the subject site for the R-T Zone, although it was so zoned, as mentioned above, from 1969 to 1973. During the Council’s deliberations on the Final Draft Potomac Subregion Master Plan, it considered the Planning Board’s recommendation to acquire the subject property as an addition to Cabin John Regional Park, in order to preserve and protect the forest and steeply sloped areas. After hearing from the property owner, the Council disapproved the Planning Board recommendation that the property be acquired, and deleted it from the Master Plan.

The Master Plan does not recommend any zoning change from the current R-90 Zone; however, the Master Plan is only a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). Since the provisions of the R-T 8 Zone (Zoning Ordinance §§59-C-1.7, et seq.) do not require compliance with the Master Plan, the question of whether or not to reject a requested reclassification due to lack of Master Plan compliance becomes a policy issue, not a legal question. This development proposal is consistent with the Master Plan’s recommendation of residential land use, but it is not consistent with its zoning recommendation, which calls for retaining the R-90 Zone.

Since the Master Plan does not designate the subject site for the R-T Zone and the nature of the surrounding properties does not allow this project to meet the statutory language for a transition from commercial or industrial uses, this application can satisfy the purpose clause only if the evidence

establishes that the subject site "is appropriate for residential development at densities allowed in the R-T Zones."

There is some evidence supporting Applicant's contention that the subject site satisfies the "appropriate" criterion in the purpose clause. Both the Technical Staff and the Planning Board recommended approval of the rezoning, subject to strict review of environmental concerns at site plan and subdivision. Compatibility with surrounding development (in terms of the type of housing units proposed) is not a real issue since the subject site is surrounded on its north, its south and, to some extent, its west with townhouse developments at comparable densities. In the opinion of Applicant's land use expert, the proposed townhouses are also compatible with the abutting parkland, since the townhouse communities to the north and south also abut the parkland. The proposals would also provide plenty of open space and other amenities for the residents and will offer the townhouses in fee simple, consistent with the intent of the R-T Zone. Although the Master Plan does not recommend the R-T Zone, it does recommend continuation of the residential use, which is consistent with this proposal. Under LATR standards, the proposed development would not generate enough peak hour trips to warrant a traffic study, and thus by that measure it would not create traffic problems for the neighbors. Finally, in 1969, the Council had approved this site for development under the R-T Zone.

In spite of the factors listed above, the District Council concludes, as did the Hearing Examiner, that the subject site, with the presently planned development of 31 townhouse units, would not be "appropriate for residential development at densities allowed in the R-T Zones," at least not at the density sought by this Applicant. This conclusion is based on evidence received during and after the hearing regarding environmental and traffic concerns. Those concerns are discussed above, and at greater length in Parts III. I. and III.H.1 of the Hearing Examiner's report, which is incorporated herein by reference. Neither the Planning Board nor the Technical Staff had the benefit, before they made their recommendations, of hearing the testimony of Ms. Mayo and Messrs. Brush and Cameron regarding the causes and effects of

excess stormwater runoff, imperviousness and erosion. Nor did they hear the testimony of Messrs Klauber and Dye regarding traffic volume and safety issues. Moreover, they could not have predicted that DPS would find it necessary to entirely waive all stormwater quantity controls, as was done after the hearing in this case, based on submission and approval by DPS of a SWMCP for a 31 unit development.

The second prong of the “floating zone” standards is compatibility. An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. Technical Staff observed that “[t]he proposed development will be compatible in terms of density with the surrounding and abutting townhouse developments. A conservation easement is proposed on the northern boundary to screen the Inverness North development from the proposed units and all setbacks exceed the minimum requirements.” Exhibit 46 at page 8. If it were not for the potential stormwater runoff problem and the traffic hazards discussed above, it would be hard to argue with this observation, since the subject site is practically surrounded with townhouse developments on three sides, the only exception being a school directly across Seven Locks Road and Cabin John Regional Park to the East of the subject site. There is no evidence that a townhouse development would be incompatible with either the nearby school or the abutting parkland, and indeed there was no evidence suggesting that a townhouse development at the proposed density would be incompatible with any surrounding development, except for the environmental and traffic issues already mentioned. In fact, the Council not only approved reclassification of the abutting properties on the north and south of the subject site to R-T Zone, it actually approved the subject site for such zoning, only to have it subsequently zoned back to its Euclidian R-90 Zone at the landowner’s request to lower taxes.

In sum, if it were not for the environmental and traffic concerns, compatibility would not really be an issue here. The District Council finds that a townhouse development on the subject site would be compatible, if the density and physical arrangement of the site were revised to eliminate the stormwater runoff and traffic problems which would impact adversely on the neighbors under the present plan.

Finally, the Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities. The Master Plan and the recommendations of the Planning Board and Technical Staff were discussed above. The Master Plan does not expressly recommend the zoning change sought by Applicant, but it does support the residential land use proposed here. The Planning Board and its Technical Staff supported the proposed rezoning, intending that corrections to protect the environment would be made at subdivision and site plan review. As mentioned above, their recommendations were made before the hearing and before DPS granted a waiver of all stormwater quantity controls.

The impact on public facilities was also discussed above. The evidence indicates that the 31 dwelling units proposed here are expected to generate eight elementary school students, four middle school students and five high school students. The Annual Growth Policy (AGP), schools test has determined that the Churchill Cluster has adequate capacity. Tr. 175. At the same time, submissions from MCPS indicate that all three schools are over capacity, as measured by MCPS, with the high school and elementary school projected to remain over capacity for the six-year forecast period, while the middle school was projected to remain near capacity. The District Council concludes that the relevant schools are crowded, but not over capacity, using the yardstick specified in the AGP schools test.

The traffic situation is more complicated, because the expected traffic from the development is not high enough to require a traffic study to satisfy LATR, but the testimony at the hearing established that there are backups at the nearby intersection of Seven Locks Road and Democracy Boulevard, and there may be a dangerous situation if the access road is located where presently planned. This situation was discussed above and at length in Part III. H. 1. of the Hearing Examiner's report. For all of the reasons set forth therein, the District Council concludes, based on the preponderance of the evidence, that the proposed

reclassification and development, as presently designed, would have adverse effects on public facilities and that approval of the requested zoning reclassification would not be in the public interest.

Based on the foregoing analysis and the Hearing Examiner's report, which is incorporated herein, and after a thorough review of the entire record, the District Council concludes, for reasons set forth at greater length in the Hearing Examiner's report, that the application does not satisfy the requirements of the purpose clause; that given the present SDP, the application proposes a development that would not be compatible with existing and planned land uses in the surrounding area; and that the requested reclassification to the R-T 8 Zone would not be in the public interest unless and until the SDP is modified to allow a sufficient reduction in the number of planned dwelling units such that the Department of Permitting Services can approve a Stormwater Management Concept Plan without waiving channel protection requirements, and the Binding Elements include a commitment by Applicant to any traffic mitigation and safety measures required by the Planning Board. A remand would also give Applicant an opportunity to present evidence on traffic issues raised at the hearing. For these reasons the application will be remanded in the manner set forth below.

ACTION

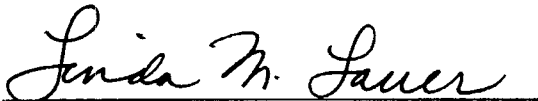
The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Montgomery County, Maryland approves the following resolution:

Zoning Application No. G-809, requesting reclassification from the R-90 Zone to the R-T 8 Zone of 5.23621 acres of land, known as Parcels 361 and 417, with addresses of 10401 and 10525 Seven Locks Road, and located on the east side of Seven Locks Road, approximately 1,600 feet north of its intersection with Democracy Boulevard, in the 10th Election District, in Potomac, is hereby **remanded** to give Applicant the opportunity to submit a revised SDP, reducing the number of planned dwelling units sufficiently so that the Department of Permitting Services can approve a Stormwater Management Concept Plan without

waiving channel protection requirements, and permitting Applicant to commit, in Binding Elements, to any traffic mitigation and/or safety measures found necessary by the Planning Board. In addition, as suggested by the Hearing Examiner, the Applicant is invited, on remand, to present additional expert evidence on mitigating traffic problems on Seven Locks Road, near the subject site. The final submitted SDP and covenants should contain the following notation in their Binding Elements:

Further, Applicant agrees to undertake right of way dedication and any traffic mitigation measures required by the Planning Board at subdivision and Site Plan.

This is a correct copy of Council action.

A handwritten signature in cursive script, reading "Linda M. Lauer", is written over a horizontal line.

Linda M. Lauer, Clerk of the Council